

Budget Heating and Air Conditioning, Inc. and Sheet Metal Workers' International Association, Local Union 15, AFL-CIO. Case 12-CA-20312

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On October 30, 2000, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions,¹ and the General Counsel filed an answering brief.²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and answering brief and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Budget Heating and Air Conditioning, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

¹ No exceptions were filed to the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(1) of the Act by threatening employee Thomas Carey during a July 12, 1999 telephone conversation, or by threatening Carey and employees Thomas Dancy, Joel Mason, and John Vaughn with discharge for engaging in union activity. Also, no exceptions were filed to the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) by discharging Carey.

² In his answering brief, the General Counsel moved to strike the Respondent's exceptions, asserting a failure to conform to Sec. 102.46(b)(1) of the Board's Rules and Regulations. Although the Respondent's exceptions do not conform in all respects to the Board's Rules, we find that they are not so deficient as to warrant striking, particularly in light of the Respondent's pro se status. See generally *A.P.S. Production/A Pimental Steel*, 326 NLRB 1296, 1297 (1998) ("The Board typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules.").

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to employees that includes expunction language inadvertently omitted by the judge.

"(a) Within 14 days from the date of this Order, offer Thomas Dancy, Joel Mason, and John Vaughn full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(b) Make Thomas Dancy, Joel Mason, and John Vaughn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the following for relettered paragraphs 2(e) and (f).

"(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2, 1999.

"(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection
To choose not to engage in any of these protected
concerted activities.

WE WILL NOT tell our employees that they must refrain from engaging in union organizing activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Sheet Metal Workers' International Association, Local Union 15, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Thomas Dancy, Joel Mason, and John Vaughn full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Dancy, Joel Mason, and John Vaughn whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Thomas Dancy, Joel Mason, and John Vaughn, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

BUDGET HEATING AND AIR
CONDITIONING, INC.

Thomas Brudney, Esq., for the General Counsel.

Rodney K. Taucher, for the Respondent.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Tampa, Florida, on August 31, 2000. The charge was filed on August 17, amended on November 22, 1999, and amended on January 11, 2000. At material times Respondent has been a Florida corporation with an office and place of business in Tampa. During the past year, in conducting its business operations, Respondent derived gross revenue in excess of \$500,000; and purchased and received goods valued in excess of \$50,000 at its Tampa facility directly from points outside Florida. Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act), at all material times. At material times the Charging Party (the Union) has been a labor organization within the meaning of the Act. Rodney Taucher, Rick Osbourn, and Brent Green were supervisors and agents at material times.¹

¹ Respondent admitted the commerce, labor organization and supervisory allegations.

The complaint alleges 8(a)(1) and (3) unfair labor practices by Respondent threatening employees with unspecified reprisals, informing employees it would be futile to select the Union, threatening employees with discharge, and discharging Thomas Carey, Thomas Dancy, Joel Mason, and John Vaughn, because of its employees' union activities. All four employees alleged herein worked for Respondent at its Hawthorne Retirement Center job until July 12, 1999. Thomas Carey testified that Brent Green and Tanya Satistaban interviewed him in late June 1999. Carey started work the next day.

Thomas Dancy applied for work with Respondent on July 2. Respondent's president, Rodney Taucher, interviewed him. Taucher told Dancy that he was not familiar with Dancy's previous employers and Dancy replied those were union companies. Taucher said that would not be a problem, as long as there's no organizing activity around. Taucher did not deny that he made that comment to Dancy.

Thomas Dancy testified that he was with Carey, Mason, Vaughn, and the foreman, Dave Miller, during breaktime on Friday, July 9, when they all discussed organizing activity. Carey, Mason, Vaughn, and Dave Miller signed union authorization cards that day. Dancy signed a card the following day. That afternoon Miller told Dancy that Dancy would have to supply his own ladder, power cords, power tools, etc. for his work.²

Thomas Carey testified that about 2 weeks after he started working for Respondent, he was told that the Company wanted him to get his own ladder. Carey said that he was not going to buy a ladder. Dave Miller³ said the Company was going to use the ladders from the Hawthorn Retirement Center on another job in 2 weeks and that Carey would have to get a ladder or a ladder would be provided and deducted from Carey's paycheck.

Dave Miller mentioned to Thomas Dancy again on Monday, July 12, that Dancy was required to have a ladder. Dancy said that he could not just yet because he needed to catch up on some bills. Miller also told Thomas Carey to phone the office while at work on July 12.

Carey called the office and spoke with General Manager Rick Osbourn. According to Osbourn's testimony, Carey phoned Osbourn regarding Carey not having a ladder. Osbourn had not met Carey before that phone call. Osbourn told Carey that unless he supplied his own ladder, the Company would supply one for him and deduct the cost from Carey's pay. Carey asked Osbourn whether Osbourn had the authority to make him buy a ladder. Carey said that Osbourn couldn't tell him that he had to buy a ladder. Osbourn asked Carey to come to the office in order to discuss the matter face-to-face and Carey refused. Osbourn asked a second time for Carey to come in the office but Carey refused. Osbourn told Carey that he was fired.

² Although all four alleged discriminatees testified, the subject of Respondent telling employees to supply their own tools came up only during the testimony of Carey and Dancy. There was no testimony showing whether Respondent said anything to Mason and Vaughn about supplying ladders or other tools.

³ Miller was not alleged as a supervisor.

Carey testified about the phone conversation with Osbourn. He testified that after Osbourn told him he would have to get a ladder he asked Osbourn what would happen if he refused to get a ladder and Osbourn replied that he would be fired because he was on his 90-day probation. Carey replied that he had not been told that he was on probation. Carey testified that he then asked Osbourn, "[W]hat if we, you know, were to organize a union, that way we wouldn't have to buy a ladder." Osbourn replied that Carey would not be organizing any union, that Carey was fired. Carey replied that Osbourn had not hired him and that if he wanted him fired he would have to send someone out there personally. Osbourn gave the phone to Rodney Taucher. Taucher told Carey that he was the owner of the Company and that Carey was fired, to get his tools and things, and get off his job. Carey told Taucher that they would have to personally come out and fire him.

Rick Osbourn testified on rebuttal that nothing was said about organizing a union until after he told Carey that he was fired. Osbourn denied that he knew anything about union activity before he fired Carey.

Carey returned to work after his July 12 phone conversation with Osbourn. Supervisor Brent Green came on the job about 30 or 40 minutes after the phone call. Green told Carey that he had pissed off the number two man and to get his tools and get off the job. Carey asked if he was being fired because he wanted to organize a union or because he wouldn't get a ladder. Green told Carey to call it what he wanted, that "we're not going to deal with the Union and you won't be organizing on this job site."

At that time Thomas Dancy asked, "[W]e're not allowed to organize, and we can't organize a Union?" Green asked Dave Miller who was Dancy and Miller replied that Dancy was an employee. Green said to Dancy, "[I]f you want to organize, you're out of here, too, okay?" John Vaughn asked what's this that the employees had a right to organize. Brent Green said, "[O]kay, anyone else who wants to organize, you're all fired, just get off of my job." Some other conversations occurred outside Carey's hearing. Carey asked if he could have something in writing saying that he was fired for organizing and "[t]hey said I was not fired for organizing, that I was fired for insubordination, and the rest of the guys had quit because they had abandoned the job."

Thomas Dancy testified that he heard a loud conversation around 2 p.m. on Monday, July 12, on the Hawthorne Retirement job and he walked over where Thomas Carey was talking to the supervisor. He overheard Supervisor Brent Green mention that there would be no union out here. Dancy told Green that it was illegal to let someone go for organizing a union. Green looked at Dancy and asked who he was. Dave Miller replied that Dancy was an employee. As Miller and Green started to walk away Dancy said, "[W]ait, stop, you can't do that." Brent Green turned and pointed his finger at Dancy and said, "I don't like this guy either, let him go too." John Vaughn spoke up and said, "[W]ait, you can't do that, we have a right to organize a union out here." Green said, "[F]ine, if that's the way all of you feel about it, you are all being let go as of now."

Vaughn was called to testify by Respondent. He testified that Brent Green told him "to his face" that he was fired. Vaughn

recalled that Green said, "[A]s far as he's concerned, we're all fired, and that was me and one other guy that was left."

Joel Mason is Thomas Carey's brother. Mason knew about Carey phoning the office regarding buying a ladder. Around 30 to 45 minutes after lunch, Brent Green came on the job and got into it with Carey. Mason overheard Carey say, "[W]ell, I don't want money taken out of my check, you know, for a ladder." Brent Green said that Carey was fired. Carey said, "[S]o I'm fired about a ladder or organizing" and Green replied, "[C]all it what you want." Thomas Dancy then walked up and asked Green what do you mean we're fired for organizing. Green asked Miller who Dancy was and Miller replied Dancy was an employee. As Green walked away he said to Dancy, "[W]ell, you're fired, too, and then anyone else who wants to organize, you're out of here." Mason asked Carey if that meant that he was fired and Carey said, "[Y]eah, that means you're fired."

Brent Green testified after being called by the General Counsel, that he received a radio call from Rick Osbourn on July 12 around noon to go to the Hawthorne Retirement Center and make sure that Thomas Carey was removed from the job. Carey was working on a ladder when Green arrived. Green asked Carey what he had done and Carey said it must have been the phone call with Rick. Green then told Carey that he was supposed to leave the job. Shortly after that Carey started talking about union rules. Thomas Dancy, Joel Mason, and John Vaughn gathered around talking about union rules. Green replied that he did not know anything about union rules, that he had never been a member of a union. Green admitted that he eventually called the sheriff to make sure all four alleged discriminatees left the premises because he felt things were getting out of control. Under examination by counsel for the General Counsel, Green admitted that after telling Carey to leave he told Thomas Dancy that he could leave too if he wasn't happy working there.

Green denied telling any alleged discriminatee that he was fired. Instead he told Thomas Carey that he was supposed to be off the job.

I. CREDIBILITY

There are several material conflicts in testimony. On July 12, Rick Osbourn talked to Thomas Carey over the phone and their testimony differs on material points. I observed their demeanor and I have considered their testimony with demeanor and the full record in mind.

I was bothered by Carey's demeanor and testimony. His testimony seemed to hit all the right spots. For example even though Osbourn told him that he could be fired if he refused to buy a ladder, Osbourn did not actually discharge Carey according to Carey's version, and Carey said to Osbourn what if we organize a union. By that testimony, Carey showed that Respondent decided to fire him only after he brought up the Union. Osbourn, on the other hand, testified that Union did not come up until after he fired Carey. I am convinced that Osbourn's version of the phone conversation comes closer to the truth and I credit his testimony in that regard.

There were conflicts in the testimony of Carey, Dancy, Mason, Vaughn, and Green regarding events on the job on the

afternoon of July 12. Of all those witnesses I was most impressed with Joel Mason's demeanor and I credit his testimony of that incident. Carey, Dancy, Mason, and Vaughn disputed Green's testimony to the effect that he did not fire anyone on July 12. However, Green did testify that he phoned the sheriff to make sure that the four alleged discriminatees left the premises and he admitted telling Dancy that he could leave if he was not happy working there. In view of my observation of his demeanor and the full record, I am convinced that Green was not truthful in his testimony that he did not discharge any of the alleged discriminatees on July 12. However, in view of the full record, I am also not convinced that Thomas Dancy truthfully testified about the incident on July 12. He testified that after going over toward a loud conversation, he heard Green say that Carey was being discharged for organizing and that there would be no union out here. That testimony does not agree with anyone else including Green, Carey, and Mason. Carey came closest to Dancy's version in testifying that Green said, "[W]e're not going to deal with the Union and you won't be organizing on this job site." I am convinced that the accounts by Green, Carey, and Dancy are incorrect. Instead I shall rely on the testimony of Joel Mason. Mason testified that after Carey asked Green if he was fired over a ladder or organizing, Green said, "[C]all it what you want." Then as Green started to walk away he told Dancy, "[W]ell, you're fired, too, and then anyone else who wants to organize, you're out of here."

Finally, there is a question of credibility regarding a prehearing affidavit. Respondent's president testified in a prehearing affidavit that he interviewed Thomas Carey and that Carey told him that he was a member of the Union. After considering the full record including testimony by Carey, Dancy, and President Taucher, I find that it was Dancy but not Carey that told Rodney Taucher his previous employers had been union companies. Taucher testified at the hearing that despite his affidavit, he was unsure of its correctness in view of Carey's testimony showing that Brent Green and Tanya Satistaban, rather than Taucher initially interviewed Carey. I find that Taucher was in error when he gave the affidavit and the record shows that he did not interview Thomas Carey.

II. FINDINGS

A. The 8(a)(1) Allegations

1. Rodney Taucher

Rodney Taucher interviewed Thomas Dancy. During that interview Taucher said that he was not familiar with Dancy's prior employers and Dancy replied they are union companies. Taucher said that would not be a problem, as long as there's no organizing activity around. Taucher did not deny that he made that comment to Dancy.

In effect, Taucher said that you may work here if you don't organize for the Union and he implied that Respondent would take corrective action if Dancy did engage in union organizing. The Board has consistently held that comments similar to the one made to Dancy, constitute a violation of Section 8(a)(1) of the Act. *Drilling Mechanical Contractors*, 318 NLRB 1140 (1995); *VJNH, Inc.*, 328 NLRB 87 (1999). I find that is the case here.

2. Rick Osbourn

The General Counsel alleged that Rick Osbourn threatened Thomas Carey during their July 12 phone conversation, that it would be futile to choose the Union as representative. However, as shown above, I do not credit that testimony by Carey. I find that the General Counsel failed to prove that allegation.

3. Brent Green

Paragraph 7 of the complaint alleged that Brent Green threatened employees with discharge if they engaged in union activity. As shown above I do not credit testimony of Thomas Carey. Carey testified that he asked Brent Green if he was being discharged for refusing to buy a ladder or for organizing a union and Green replied, "[C]all it what you want. We're not gonna deal with the Union and you won't be organizing on this job site." Brent Green testified that the three other alleged discriminatees crowded around him and started talking about union rules. Joel Mason testified that he heard Carey ask if he was discharged about the ladder or union organizing and that Green replied, "[C]all it what you want."

I credit the testimony of Joel Mason. In view of that credited testimony I find that Green did not say, "[Y]ou won't be organizing on this job site." In view of that determination there was nothing in Green's response to Carey's question that supported the allegation that Green threatened the employees with discharge if they engaged in union activity.

B. The 8(a)(3) Allegations

There are situations in which an employer may discharge employees in order to interfere with a union organizing campaign. After fully considering the record and making credibility determinations, I am convinced that was not the case in the discharge of Thomas Carey. Despite that fact that Respondent's president, Rodney Taucher, told Thomas Dancy that his prior work for union companies wasn't a problem as long as there was no organizing, there was no showing that Respondent knew of any organizing activity before Carey was discharged. It is true that Foreman Dave Miller discussed organizing with all the alleged discriminatees and actually signed a union authorization card on Friday, July 9, but Miller was not alleged as a supervisor and that matter was not fully litigated.⁴ Moreover, nothing was said during Taucher's interview of Dancy to cause Respondent to suspect that Dancy may actually engage in organizing. The mere fact that Dancy had formerly worked for union employers does not establish that Respondent knew or suspected that he would engage in organizing activity. The hiring of Dancy tends to show just the opposite. Why would the president of the company hire Dancy if he strongly opposed union organizing and suspected that Dancy would engage in union organizing activity?

Counsel for the General Counsel relied on the prehearing affidavit of Rodney Taucher that Carey told Taucher of his union membership. However, as shown above, the full record shows that Taucher was mistaken in that affidavit and that the employee he interviewed and talked to about union companies was actually Thomas Dancy. Therefore, the record does not show

⁴ The General Counsel did not argue that Respondent gained knowledge of organizing activity through Dave Miller.

that Respondent learned of Carey's union membership during his employment interview. In fact the testimony of Thomas Carey shows that was not the case. Counsel for the General Counsel then argued that Carey participated in organizing activity along with the other alleged discriminatees, on July 9. However, as shown above, there is no evidence that Respondent learned of that activity. Finally, the General Counsel argued that Respondent learned of Carey's union activity during his phone conversation with Rick Osbourn, before his discharge. As shown above, I credit the testimony of Osbourn showing that the Union did not come up until after Osbourn told Carey that he was fired.

In cases of this type I must examine whether the General Counsel has proved a prima facie case showing that Respondent discharged all or some of the alleged discriminatees out of antiunion animus. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981); cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As to Thomas Carey I find that the General Counsel failed to prove a prima facie case. The General Counsel failed to prove that Respondent knew of Carey or any other employees' union activities, before it discharged Carey.

Moreover, the record established that Carey was fired for a reason that was not connected with union organizing. Both Carey and Thomas Dancy were told that Respondent would require them to supply their own ladders or have the cost of ladders deducted from their pay. Nothing in the record illustrated that the question of supplying ladders had anything to do with the Union.

The credited evidence showed that Thomas Carey refused from the very first suggestion, to either buy or have money deducted from his paycheck for a ladder. In fact even Thomas Carey's testimony supports that evidence. Even if I considered the discredited testimony by Carey, it is apparent that he was argumentative and uncooperative in his talk with Osbourn. I credit Osbourn's testimony that Carey twice refused to come to the office and discuss the matter face-to-face. Then, after Carey was fired, he refused to leave the job. I find in agreement with the testimony of Osbourn that he discharged Carey during that phone conversation before Carey said anything about a union.

The General Counsel argued that Respondent treated Carey in a disparate manner. However, that argument is misplaced. An employer may discharge someone even if it treated other employees differently, provided the motive for the discharge was not protected activity. Here, the record shows that Respondent had no knowledge of Carey being involved in union activity before his discharge. Therefore, regardless of whether Carey was treated differently than other employees, the fact remains; he was not discharged for activity protected under the Act. I cannot conclude that disparate treatment illustrates that Respondent used pretext in order to disguise an illegal discharge when the credited evidence established that the employee was actually discharged for another reason.

However, the evidence shows a different situation developed after Brent Green came on the job to insure that Carey left. While Green and Carey were arguing, employees Dancy, Vaughn, and Mason questioned whether Green was discharging

Carey because Carey was trying to organize the employees. The credited testimony of Joel Mason was, as shown above, that Mason overheard Carey say, "[W]ell, I don't want money taken out of my check, you know, for a ladder." Brent Green said that Carey was fired. Carey said, "[S]o I'm fired about a ladder or organizing" and Green replied, "[C]all it what you want." Thomas Dancy then walked up and asked Green what do you mean we're fired for organizing. Green asked Miller who Dancy was and Miller replied Dancy was an employee. As Green walked away he said to Dancy, "[W]ell, you're fired, too, and then anyone else who wants to organize, you're out of here." Mason asked Carey if that meant that he was fired and Carey said, "[Y]eah, that means you're fired."

Green admitted that he subsequently called the sheriff to make sure the four employees were off the premises. I am convinced that the employees reasonably believed they were being discharged. The credited evidence proved that Green fired first Dancy, then anyone else who wanted to organize, because of their questioning whether he was firing Carey for union organizing. All four alleged discriminatees were questioning whether Respondent was discharging someone because of efforts to organize for the Union. That evidence proves prima facie, that Respondent was motivated to discharge Dancy, Mason, and Vaughn because of their talk about union organizing.

I am fully aware of the credited evidence showing that alleged discriminatee Carey first brought up union organizing as a reason for his discharge and my finding that Carey was not fired for that reason, plus the fact that alleged discriminatee Thomas Dancy asked, "[W]hat do you mean we're fired for organizing," before Brent Green made a hostile comment about union organizing. I also am aware that despite Dancy's remark, Carey was not being fired for organizing. Nevertheless, the comments by Dancy, Mason, and Vaughn were protected because they related to employees' ability to engage in union organizing activity and the credited evidence proved they were fired because they made those comments.

Moreover, the record failed to show that Respondent would have discharged those three employees in the absence of their union activity. Respondent took the position that it did not discharge those three employees. Instead those three walked off the job. As shown above, the credited evidence proved otherwise. The credited testimony of Joel Mason proved that he, Dancy, and Vaughn were discharged because of their comments about union organizing and Respondent failed to prove it would have discharged them in the absence of their protected activity.

Finally, there may be a question of the employees' conduct. Here, Respondent did not allege that it discharged Dancy, Mason, and Vaughn because of their conduct. Moreover, the record does not support a finding of misconduct. There was a disturbance but there was no showing that anything was done other than question Supervisor Green as to whether Respondent was or could, discharge someone for organizing activity. Green did phone the sheriff because "I was just trying to get—I was just trying to stop what was kind of getting out of control." Moreover, Green did not feel the conduct justified discharge as evidenced by his testimony that he did not discharge any of the three.

The full record illustrates that Thomas Carey was discharged during a dispute over a ladder. He refused to leave the job and Supervisor Brent Green was dispatched to insure that Carey left. While there other employees questioned whether Respondent was discharging Carey because of union activity. Green reacted to those questions by telling the employees present they were also discharged. Green phoned the sheriff to insure that all four employees left the premises. Respondent proved that it had actually discharged Carey for insubordination and that it would have discharged him in the absence of his union activities. However, the General Counsel proved that Respondent was motivated to discharge Dancy, Mason, and Vaughn because they questioned whether Respondent was discharging Carey because of his organizing activity and Respondent failed to prove that it would have discharged Dancy, Mason, and Vaughn in the absence of those questions.

CONCLUSIONS OF LAW

1. Budget Heating and Air Conditioning, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Sheet Metal Workers' International Association, Local Union 15, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by telling its employee that union organizing activity would not be permitted, has engaged in conduct in violation of Section 8(a)(1) of the Act.
4. Respondent, by discharging Thomas Dancy, Joel Mason, and John Vaughn, because of its employees' protected union activities, has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally discharged Thomas Dancy, Joel Mason, and John Vaughn in violation of sections of the Act, I shall order Respondent to offer Dancy, Mason, and Vaughn immediate and full employment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. I further order Respondent to make Dancy, Mason, and Vaughn whole for any loss of earnings suffered as a result of the discrimination against them and remove from its records any reference to the unlawful actions against Dancy, Mason, and Vaughn and notify Dancy, Mason, and Vaughn in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Budget Heating and Air Conditioning, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Telling its employees that it will not allow the employees to engage in union organizing activity.
 - (b) Discharging its employees because of their union activities.
 - (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days of this Order, offer Thomas Dancy, Joel Mason, and John Vaughn immediate and full employment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice and make Dancy, Mason, and Vaughn whole for any loss of earnings and other benefits suffered as a result of the discrimination against each of them, plus interest, in the manner set forth in the remedy section of the decision.
 - (b) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharge of Dancy, Mason, and Vaughn, and within 3 days thereafter notify Dancy, Mason, and Vaughn in writing that this has been done and that the discharge will not be used against any of them in any way.
 - (c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.
 - (d) Post at its facility in Tampa, Florida, copies of the attached notice.⁶ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 12 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.